

STATE OF TENNESSEE

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Opinion No. 02-007

Board of Veterinary Medical Examiners

QUESTIONS

1. If Tenn. Code Ann. §§ 63-12-139 and 63-12-140 were repealed, would the Board of Veterinary Medical Examiners still have statutory authority to enforce a facilities permit system for non-veterinarian owned facilities under Tenn. Code Ann. § 63-12-137 (b) (1)?
2. What is “physical plant” as that term is used in Tenn. Code Ann. § 63-12-139?
3. Would adoption by the Board of Veterinary Medical Examiners of Proposed Rules 1730-1-.01, 1730-2-.01 and 1730-3-.01 concerning the definition of “physical plant” exceed statutory authority under the Veterinary Practice Act?

OPINIONS

1. Although repeal of Tenn. Code Ann. §§ 63-12-139 and 63-12-140 would tend to make somewhat ambiguous the meaning of the remaining references to premises permits in Tenn. Code Ann. §§ 63-12-101, *et seq.*, it does appear that a court could find that the Board of Veterinary Medical Examiners still would have authority to enforce a facilities permit system for non-veterinarians under Tenn. Code Ann. § 63-12-137 (b) (1).
2. The term “physical plant” as used in Tenn. Code Ann. § 63-12-139 may be defined by the Board of Veterinary Medical Examiners by rule. Since the Veterinary Practice Act does not define “physical plant,” the Board may apply the common understanding of the term as used in a context which is reasonably related to the ownership or operation of any veterinary facility or any other premises where a licensed veterinarian practices or where the practice of veterinary medicine occurs.
3. Tenn. Code Ann. § 63-12-106 (1) confers broad authority on the Board to “[a]dopt reasonable rules governing the practice of veterinary medicine as are necessary to enable it to carry out and make effective the purpose and intent of this chapter,” and Tenn. Code Ann. § 63-12-139 (c) refers to

“minimum standards established by board rule as to sanitary conditions and physical plant.” The Act does not define the term “physical plant,” and therefore its interpretation rests with the Board, whose construction of the term likely will be upheld so long as it is rational and consistent with the Act. However, we doubt that all the terms used in the proposed rule definition of “physical plant” would fit within the ambit of a commonly understood definition of the term “physical plant” as used in the context of veterinary facilities and licensed veterinary practice. Regardless, the Board still may regulate these areas under its broad veterinary facilities inspection authority granted in Tenn. Code Ann. § 63-12-129 (a) (2). Likely the Board still would be acting within the scope of the Veterinary Practice Act viewed as a whole and in light of its general purpose.

ANALYSIS

1. The Veterinary Practice Act, Tenn. Code Ann. § 63-12-101, *et seq.* contains numerous references to premises permits. Further, since the Act mentions no type of permit other than a premises permit, its references to “permit” necessarily mean “premises permit.” The Act defines “license” as “any permit, approval, registration or certificate issued by the board.” Tenn. Code Ann. § 63-12-103. The Act also authorizes the Board to “[i]ssue temporary permits or licenses to duly qualified applicants which shall be signed by the secretary.” Tenn. Code Ann. § 63-12-106 (8). The Board also is authorized to “[c]onduct investigations and hearings upon complaints calling for discipline of a licensee or applicant for license or certificate or permit holder or applicant for a certificate or a permit.” Tenn. Code Ann. § 63-12-106 (10). The Board also has authority to enter an order to

discipline any person, corporation or other similar organization, public or private, for-profit or not-for-profit, who or which, after proper hearing, has been found guilty by the board of a violation of one (1) or more provisions of this chapter or any rule of the board. The board, based upon the evidence and its findings of fact, may enter its final order, which may include one (1) or more of the following provisions:

* * * *

(2) Suspend or limit the right to hold a certificate or premises permit in this state for a period not to exceed two (2) years;

* * * *

(4) Impose judgment and penalties, but suspend enforcement thereof and place the licensee or license applicant, certificate holder or certificate applicant, premises permit holder or premises permit applicant on probation;

(5) Suspend the imposition of judgment and penalties;

- (6) Refuse to issue a new license, certificate, or premises permit;
- (7) Withhold any license, certificate, or premises permit, either permanently or for a period of time, when the same has not been delivered;
- (8) Suspend or limit the right to own or operate a veterinary facility in this state; or
- (9) Take such other action in relation to discipline as the board in its discretion may deem proper.

Tenn. Code Ann. § 63-12-128 (in pertinent part). Further, under Tenn. Code Ann. § 63-12-129 (a) the enforcement of the laws and rules of the Board regulating the practice of veterinary medicine in this state is primarily vested in the Board, and its powers and duties in this regard include the following:

- (1) To employ investigators, counsel and clerical assistance or any other necessary personnel;
- (2) To inspect all veterinary facilities to determine sanitary conditions, physical equipment, methods of operation, keeping of records, etc. This inspection shall be by a member of the board or a licensed veterinarian representing the board;
- (3) To inspect licenses; and
- (4) To conduct investigations of all alleged violations.

Moreover, Tenn. Code Ann. § 63-12-130 provides that “the state and county prosecuting attorneys shall prosecute all persons charged with violation of any of the provisions of this chapter or rules of the board,” and that the secretary-treasurer of the Board, or other person employed or designated by the Board, “shall assist the prosecuting attorneys by furnishing them evidence of such violations whenever the board comes into possession of same.” In addition to the penalties provided in the Act, the Board may institute legal proceedings to enjoin the violation of the provisions of the Act or the rules of the Board. Tenn. Code Ann. § 63-12-132. Clearly, many of the regulatory, investigatory and enforcement powers of the Board are not confined to licensees or applicants for a license to practice veterinary medicine or to become a licensed veterinary technician, but also extend to a broader category of persons and entities including premises permit holders and premises permit applicants.

The Act refers further to premises permits in Tenn. Code Ann. § 63-12-137, which provides in pertinent part:

- (b) No person, corporation or other similar organization, public or private, for-profit or not-for-profit, other than a veterinarian duly licensed in this state, shall own or operate a

veterinary facility in this state, except as follows:

- (1) Any person, corporation or similar organization, public or private, for-profit or not-for-profit, shall apply for and receive a premises permit before the commencement of operations at the veterinary facility; and

- (2) The owner of the veterinary facility shall not restrict or interfere with medically appropriate veterinary diagnostic or treatment decisions by the licensed veterinarians employed at the veterinary facility.

Repeal of Tenn. Code Ann. § 63-12-139 (regarding premises permits) and Tenn. Code Ann. § 63-12-140 (regarding prohibition of and penalty for operation without a permit) certainly would raise a question as to whether or not the legislature intended to repeal entirely the Board's authority to enforce a facilities permit system. However, presuming that after any such repeal, all of the other sections of the Act which either directly mention or allude to premises permits were to remain, then the question as to whether or not the Board still would have statutory authority to enforce a facilities permit system for non-veterinarian owned facilities under Tenn. Code Ann. § 63-12-137 (b) (1) becomes somewhat ambiguous. It is a principle of statutory construction that the legislature is presumed not to have intended to do a vain or useless thing, *Texas Gas Transmission Corp. v. Atkins*, 205 Tenn. 495, 327 S. W. 2d 305 (1959), or to intend an absurdity. *Epstein v. State*, 211 Tenn. 633, 366 S. W. 2d 914 (1963). Moreover, regarding the direct and indirect references to premises permits which would remain in the Act after any repeal of Tenn. Code Ann. §§ 63-12-139 and 63-12-140, a court cannot presume that the legislature intended to place superfluous terms in the statute. *State v. Vestal*, 611 S. W. 2d 819 (1981). Also, it is the court's duty to construe a statute so that no part is inoperative, superfluous, void or insignificant. *State v. Northcutt*, 568 S. W. 2d 636 (Tenn. Crim. App. 1978). The words used in a statute are used purposefully to convey some intent and have meaning and purpose. *Tennessee Growers, Inc. v. King*, 682 S. W. 2d 203 (Tenn. 1984). Yet, as we have said, if Tenn. Code Ann. §§ 63-12-139 and 63-12-140 were repealed, the Act as it pertains to premises permits would be ambiguous; a statute may be said to be ambiguous when its application is not entirely clear or when it is susceptible to two or more meanings. *See St. Peter's Asylum v. Riley*, 43 Tenn. App. 683, 311 S. W. 2d 336 (1957). However, the statute should be viewed as a whole and in light of its general purpose. *City of Lenoir City v. State ex rel City of Loudon*, 571 S. W. 2d 297 (Tenn. 1978).

Therefore, it is the opinion of this office that although repeal of Tenn. Code Ann. §§ 63-12-139 and 63-12-140 would tend to make somewhat ambiguous the meaning of the remaining references in the Act to premises permits, nevertheless, due to the numerous direct and indirect references to premises permits which would remain in the Act after repeal of the above two sections, it does appear that a court could find that the Board of Veterinary Medical Examiners still would have statutory authority to enforce a facilities permit system for non-veterinarian owned facilities under Tenn. Code Ann. § 63-12-137 (b) (1). We note that otherwise, after any repeal of the above two sections, under Tenn. Code Ann. § 63-12-137 (b) no person or entity other than a veterinarian duly licensed in this state could legally own or operate a veterinary facility within this state.

2. The term “physical plant” is not defined in Tenn. Code Ann. § 63-12-139 or anywhere in the Act. However, Webster’s New International Dictionary of the English Language, Unabridged (Second Edition, 1952) gives several pertinent definitions of “plant”:

a The machinery, apparatus, fixtures, etc. employed in carrying on a trade or a mechanical or other industrial business; as, an electric-light *plant*, a fishing *plant*, etc. In the commercial sense, a *plant* may include real estate and all else that represents capital invested in the means of carrying on a business, exclusive of the raw material or a manufactured product. **b** A factory, workshop or apparatus complete, for the manufacture of a particular product, as, a bicycle *plant*. **c** By extension, the equipment of any institution, as, the *plant* of a college.

Tenn. Code Ann. § 63-12-139 (c) refers to “minimum standards established by board rules and regulations as to sanitary conditions and physical plant,” and Tenn. Code Ann. § 63-12-139 (e) provides that

The board shall deny any application for a premises permit if the inspection reveals that the premises do not meet the minimum standards established by the board. The applicant shall pay the inspection fee for each additional reinspection required to determine whether any deficiencies found by the board have been brought into compliance with the minimum standards established by board rules and regulations as to sanitary conditions and physical plant.

Clearly, it is the Board which establishes by rule the minimum standards as to physical plant, and by necessary extension, it is the Board which must by rule interpret and apply the meaning of the term “physical plant.” The Act confers upon the Board the authority to adopt reasonable rules governing the practice of veterinary medicine as are necessary to enable it to carry out and make effective the purpose and intent of the Act. Tenn. Code Ann. § 63-12-106 (1). Although the current rules promulgated by the Board do not specifically define the term “physical plant,” Tenn. Comp. R. and Regs. 1730-2-.02 (3) regarding veterinary facilities inspection and premises permits echoes the language found in Tenn. Code Ann. §63-12-129 (a) (2) mentioned above:

Inspections shall ensure that each veterinary facility meets minimum standards. Inspections shall include, but not be limited to, determination of sanitary conditions, physical equipment, method of operation, keeping of records, etc., with re-inspections as necessary.

The Board inspects all veterinary facilities as required by the Act, both under Tenn. Code Ann. § 63-6-139, regarding premises permits, as well as under Tenn. Code Ann. § 63-12-129 (a) (2), regarding enforcement of the laws and rules of the Board regulating the practice of veterinary medicine. The latter section describes generally what sorts of things the Board should look at in its inspection of veterinary

facilities “to determine sanitary conditions, physical equipment, method of operation, keeping of records, etc.” The general rules concerning veterinary facility inspections and premises permits contain requirements concerning sanitation, heating, cooling, lighting and waste disposal, as well as requirements for examination rooms, surgery area and equipment, animal quarters, recordkeeping, laboratory services, radiology, pharmaceuticals, etc. Tenn. Comp R. and Regs. 1730-2-.01 *et seq.* It appears that the Board’s current interpretation (by its rules) concerning what its inspections should include reflects the language of both Tenn. Code Ann. § 63-12-129 (a) (2) as well as Tenn. Code Ann. § 63-12-139.

We believe that the Board thus is correct in interpreting by rule its veterinary facilities inspection authority as extending beyond the narrow scope of a “bricks and mortar” understanding, *i.e.*, not restricted to real estate or any improvements but also including sanitary conditions, physical equipment, methods of operation, keeping of records, etc. Tenn. Code Ann. § 63-12-129 (a) (2). However, since the term “physical plant” as it is used in Tenn. Code Ann. § 63-12-139 is nowhere defined in the Act, the Board may apply a commonly understood definition of the term such as found in Webster’s Dictionary, used in a context which is reasonably related to veterinary facilities “or any other premises where a licensed veterinarian practices or where the practice of veterinary medicine occurs.” Tenn. Code Ann. § 63-12-139.

3. Proposed Rules 1730-1-.01, 1730-1-.02 and 1730-1-.03 of the Board of Veterinary Medical Examiners would define the term “Physical Plant” as

The physical structure of a veterinary facility and all items located within it to include: records, equipment, pharmaceuticals, animal quarters, radiology, surgery, safety measures, storage, lighting, heating, and any other areas as deemed necessary for inclusion by the Board of Veterinary Medical Examiners.

The Act confers broad authority on the Board to “[a]dopt reasonable rules governing the practice of veterinary medicine as are necessary to enable it to carry out and make effective the purpose and intent of this chapter,” Tenn. Code Ann. § 63-12-106 (1), as well as authority under Tenn. Code Ann. § 63-12-139 to set “minimum standards established by board rule as to sanitary conditions and physical plant.” A regulation promulgated under such a general, broad grant of authority is valid if the regulation “is reasonably related to the purpose of the enabling legislation.” *See, Compton v. Tenn. Dept. of Public Welfare*, 532 F. 2d 561, 564 (6th Cir. 1976). Interpretation of a statute by the agency charged with enforcement or administration of it is entitled to “consideration and respect” and should be awarded appropriate weight, particularly in the interpretation of doubtful or ambiguous statutes, but it is not controlling. *Nashville Mobilephone Co., Inc. v. Atkins*, 536 S. W. 2d 335 (Tenn. 1976). An agency regulation will be upheld, even if not within the agency’s explicit statutory authority, if it represents a legitimate, reasonable and direct adjunct to the power expressly conferred. *See Stallings v. Harris*, 493 F. Supp. 956, 958 (W. D. Tenn. 1980). As a general rule, construction of a statute by those charged with its administration is entitled to substantial deference in light of the agency expertise. *See U.S. v. Rutherford*, 442 U.S. 544, 553, 99 S.Ct. 2470, 2476 (1979) If a statute is silent or ambiguous with respect to a specific issue, the question for the

court is whether an agency's interpretation of its governing statute is rational and consistent with the statute. *See Sullivan v. Everhart*, 494 U.S. 83, 110 S. Ct. 960 (1990). Thus, the Board has rule-making authority to define, delineate and implement the allowable scope of the practice of licensed veterinarians and the operation of veterinary facilities as necessary to enable the Board to carry out and make effective the purpose and intent of the Act, "in the interest of the health, safety and welfare of the animal population and the citizens of Tennessee," Tenn. Code Ann. § 63-12-102, as may be rational and consistent with the statute.

The legislature clearly intended the Board to regulate veterinary facilities by inspecting them to determine "sanitary conditions, physical equipment, methods of operation, keeping of records, etc." Tenn. Code Ann. § 63-12-129 (a) (2). However, we doubt that all of the terms used in the proposed rule definition of "physical plant" would fit within the ambit of a commonly understood definition of that term as used in the context of veterinary facilities and licensed veterinary practice. For example, we question whether the terms "records," "pharmaceuticals," or "safety measures" fit squarely within the Webster's Dictionary definition of the term "plant" as applied to licensed veterinary practice and veterinary facilities.

The term "records" might not fit within a commonly understood definition of "physical plant" as used in Tenn. Code Ann. § 63-12-139. (Arguably, however, the records might be considered part of the physical plant of a veterinary facility, especially since such records likely are maintained on or in equipment such as computer programs or filing cabinets within a veterinary facility, and one of the Webster's Dictionary definitions of the term "plant" includes "equipment.") However, since "keeping of records" is referred to specifically in Tenn. Code Ann. § 63-12-129 (a) (2), as is also "physical equipment," we believe the better view would be not to include "records" in the definition of "physical plant." Instead, the Board can regulate records and recordkeeping under Tenn. Code Ann. § 63-12-129 (a) (2).

Similarly, we question whether the Board's inclusion of "pharmaceuticals" in its proposed rule definition of "physical plant" under Tenn. Code Ann. § 63-12-139 falls within the ambit of a common understanding of that term as used in the context of veterinary facilities or licensed veterinary practice. Tenn. Comp. R. and Regs 1730-2-.05 (in the General Rules Governing Veterinary Facilities) refers not only to veterinary prescription drugs themselves, but also to procedures for prescribing, dispensing or otherwise distributing pharmaceuticals, as well as to appropriate recordkeeping. Again, the term "pharmaceuticals" in the proposed rule definition of "physical plant" more properly could be included under the broad powers granted to the Board under Tenn. Code Ann. § 63-12-129 (a) (2), especially since the Board's current interpretation of the term "pharmaceuticals" includes methods of operation as well as keeping of records. ("Methods of operation," of course, should be regulated under Tenn. Code Ann. § 63-12-129; in our view "methods of operation" likely would not be considered "physical plant" under even a broad reading of the term.)

Moreover, depending on the Board's interpretation of the term, "safety measures" might or might not fall within the commonly understood definition of the term "physical plant" as applied by the Board in

the context of veterinary facilities and licensed veterinary practice. “Safety measures” could refer to actions taken to promote safety, or it also could refer to physical equipment utilized to assess, monitor and maintain safety. As we have said, equipment falls within the Webster’s Dictionary definition of “plant.” On the other hand, “safety measures” certainly may fall broadly within the ambit of “methods of operation” and “physical equipment” as used in Tenn. Code Ann. § 63-12-129 (a) (2), depending on what “safety measures” the Board is referring to.

Finally, regarding “safety measures” as well as a number of other terms, the Board legitimately could elect to interpret them either as part of the “physical plant” or “sanitary conditions” under Tenn. Code Ann. § 63-12-139, or in the alternative it could elect to interpret them under its veterinary facilities inspection authority over “physical equipment” and “sanitary conditions” under Tenn. Code Ann. § 63-12-129 (a) (2). Except for those terms which, as we have mentioned, in our view clearly fall outside the scope of “physical plant,” the Board may apply and interpret the term “physical plant” by adopting “reasonable rules governing the practice of veterinary medicine as are necessary to enable it to carry out and make effective the purpose and intent of this chapter,” Tenn. Code Ann. § 63-12-106 (1), and “minimum standards established by board rule as to sanitary conditions and physical plant,” Tenn. Code Ann. § 63-12-139 (c). Regarding those terms which may fall outside the scope of the term “physical plant,” we see no reason why the Board could not construe them as falling within its inspection authority over veterinary facilities to determine “sanitary conditions, physical equipment, methods of operation, keeping of records, etc.” Tenn. Code Ann. § 63-12-129 (a) (2). In either event, the Board likely would be acting within the scope of the Veterinary Practice Act viewed as a whole and in light of its general purpose. *City of Lenoir City, supra*. A court likely would uphold the Board’s interpretation of any silent or ambiguous parts of its governing statute if it could be shown that the Board’s construction was rational and consistent with the Act. *See Sullivan v. Everhart, supra*. Last, the Board can take disciplinary action *via* Tenn. Code Ann. § 63-12-128 against any licensed veterinarian or veterinary facility that violates any of the Board’s rules.

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